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IN THE

Supreme Court of the United States

October Term, 1969

No.....

FRANKLIN W. BAUMGARTNER

and

THE STATE OF NEBRASKA,

Petitioners

v.

GULF OIL CORPORATION

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

The Petitioners Franklin W. Baumgartner and the State of Nebraska respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Nebraska entered in this proceeding on May 9, 1969.*

OPINIONS BELOW

The opinion of the Supreme Court of Nebraska, not yet reported, appears in the Record submitted herewith, Pages 45-66. The opinion of the trial court, the District Court of Banner County, Nebraska, is included in the certified record submitted with this petition at Pages 27-31.

*The State of Nebraska became a Plaintiff Intervenor and joined in the relief sought by petitioner Baumgartner. For the purpose of this petition, the use of the term "Petitioner" will be applicable to both such parties. The original defendant in the trial court was the British American Oil Producing Company and Gulf Oil Corporation was later substituted therefor. For the purposes of this petition said parties will be identified as the "defendant".

JURISDICTION

The judgment of the Supreme Court of Nebraska was entered on May 9, 1969. A timely petition for rehearing was denied on September 16, 1969, and the petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257 (3).

QUESTIONS PRESENTED

1. As a matter of Nebraska constitutional and statutory law, and in light of the provisions of the Constitution of the United States, may one be precluded from drilling on his lands to recover the oil and gas thereunder while at the same time the adjoining owners are permitted to conduct a secondary waterflood project which sweeps the oil off the non-drilling party's land and which oil is then recovered by the party conducting the secondary recovery project, and all without compensation to the non-drilling party.

2. As a matter of Nebraska statutory law which expressly provides that a unit agreement for the recovery of oil is only binding upon the parties who execute the agreement, may such an agreement be so applied as to take away the property of one who is not a party to such unit agreement and with such taking being without due process or compensation for the oil so taken and in violation of the Constitutions of the United States and the State of Nebraska.

3. May any party conduct such operations that are known will sweep oil off another party's land where such party is precluded from drilling, and which oil is recovered from the lands operated by the same party who is conducting the waterflood project, and without compensation to the non-drilling party, all in violation of the Constitution of the United States and the State of Nebraska.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article XIV of the Constitution of the United States; Section 3 and 21 of the Bill of Rights of the Constitution of the State of Nebraska. Nebraska Revised Statutes of 1943, 57-910(10), 57-903(8), 57-903(10), 57-908(3).

STATEMENT OF THE CASE

Petitioner Baumgartner sought damages for the taking of oil by defendant from the lands covered by petitioner's oil and gas lease, which taking was caused by the injection of water in the lands of defendant, the forcing of that water on to the lands of petitioner and the further forcing of the oil off of the petitioner's land and on to the lands of defendant where the oil was recovered, and all during the time when the petitioner was denied the right to drill on his lands. Upon the trial of the issues petitioners were awarded damages in the total amount of $89,933.00 for the oil so swept off the lands and recovered by the defendant. (R: p. 33)

Petitioner Baumgartner raised the constitutional matters in his original petition as filed in the Trial Court (R: Par. 5, p. 3), (R: Par. 11, p. 6), (R: Par. 6, p. 7). The Supreme Court in its decision ignored the constitutional rights of petitioners when it stated ". . . that the correlative and constitutional right of a landowner or leaseowner is not the right to drill . . ." (R: p. 62)

The denial of the right of petitioner to drill on his land was affirmatively supported by the defendant, who, and as stated, while that right was being denied, swept the oil off of petitioner's land *and which oil* was recovered by the defendant.

Before discussing the constitutional question involved it is necessary to set forth the factual situation, the conti-

nuity of events, and the statutory and case law applicable thereto, all of which is summarized as follows:

1. Under date of June 13, 1960, and for the payment of $12,864 therefor, petitioner was awarded the oil and gas lease from the State of Nebraska acting by and through the Board of Educational Lands and Funds, and which lease covered all of Section 16, Township 18 North, Range 53 West, Banner County, Nebraska.

(a) A lessee under a prior lease covering the same lands here involved had drilled a dry hole in the approximate center of the NE¼NE¼ of said Section 16; also, petitioner had drilled a dry hole in the SW¼NW¼ of said Section 16.

2. On April 18, 1961, the Nebraska Oil and Gas Conservation Commission entered its order approving the Kenmac Unit Agreement and the secondary recovery program by waterflooding of the area subject to said Unit Agreement. Petitioner did not join the Unit Agreement and the lands subject to his oil and gas lease were not incorporated in the area to be waterflooded by the secondary recovery program. (R: Par. 4, p. 28)

The Nebraska Oil and Gas Conservation Act (Revised Statutes, Nebraska, 1943) then in force and relating to unit agreements, provided in part as follows:

57-910(10) " . . . An agreement for the unit or cooperative development and operation of a field or a pool, or a part of either, . . . is authorized and may be performed, and shall not be held or construed to violate any of the statutes of this state relating to trusts, monopolies, or contracts and combinations in restraint of trade, if the agreement is in the public interest, protective of correlative rights, and reasonably nec-

essary to increase ultimate recovery or to prevent waste of oil or gas. *Such agreements bind only the persons who execute them, and their heirs, successors, assigns and legal representatives.*" (emphasis added)

3. Part of the oil and gas pool was located under petitioner's land and it was stipulated by the parties that the recoverable oil from that part of the lands covered by the lease held by petitioner was 38,878.3 barrels of oil, and which stipulation was adopted by the Trial Court. (R: Par. 10, 11 and 12, p. 29 and 30)

4. Petitioner, attempting to exercise his right to recover the oil under his lands, and having no well on his lands, filed his application for a permit to drill a well on the lands subject to his lease at a location which was then thought could be productive of oil; that application was denied by the Nebraska Oil & Gas Conservation Commission (R: Par. 8, p. 29) even though and at such time the Nebraska Oil and Gas Conservation Act provided in part as follows:

57-903(8) " . . . Owner shall mean the person who has *the right to drill* into *and produce* from a pool and to appropriate the oil or gas *he produces therefrom* either for himself or for himself and others." (emphasis added)

57-903(10) "Correlative rights shall mean the opportunity afforded *to the owners of each property* in a pool to produce, as far as is reasonably practicable to do so without waste, his just and equitable share of the oil or gas, or both, in the pool." (emphasis added)

57-908(3) " . . . Upon application of the person *entitled to drill* and after hearing, if the

Commission finds that a well drilled at the prescribed location would not produce in paying quantities, or all such surface conditions would substantially add to the burden or hazard of drilling such well, the Commission is authorized to enter an order permitting the well to be drilled at a location other than that prescribed by such specifying order; provided, the Commission shall include in the order suitable provisions to prevent the production from the spacing unit of more than its just and equitable share of oil and gas in the pool." (emphasis added)

5. Petitioner, maintaining that under the factual situation presented to the Commission and believing that the statute gave him, as owner, the right to drill, and further believing that the Commission was authorized to issue a permit as to the drilling of a well on petitioner's land, sought review in the District Court (as provided for in the statute) to set aside the order of the Commission in denying the petitioner the right to drill. The District Court on June 13, 1963, reversed the order of the Commission and held that the petitioner was entitled to the permit to drill at the requested location. (R: Par. 8, p. 29)

NOTE: It should be noted that no appeal was taken from that decision of the District Court to the Supreme Court of the State of Nebraska. Therefore, and under all rules of procedure, and insofar as the parties here are concerned, *that right to drill was unequivocally fixed and established.* (emphasis added)

6. Pursuant to the decree of the District Court, the Oil and Gas Commission had a further hearing of the issues and on February 16, 1965 the Commission held that petitioner was entitled to a permit to drill on the original application filed by petitioner in 1961.

7. However, by the time the Commission granted petitioner the right to drill, the water injected by the defendant had so encroached in the formations under petitioner's land, the oil thereunder had been or was being swept off his lands, and the drilling of a well by petitioner would only have recovered the water injected by the defendant.

(a) The District Court, in its decree entered on June 13, 1963, also found that the operations of the defendant had at that time already caused water to encroach in the oil and gas formation underlying the lands covered by petitioner's oil and gas lease.

(b) The Commission, at the time of actually issuing the permit to drill in 1965, found that the operations of defendant had caused water to encroach in the stated formations in the lands covered by petitioner's oil and gas lease, and that the oil which was originally present there had been or was being swept off the lands.

8. Petitioner then filed suit for damages for the taking of the oil so swept off his lease, and on July 2, 1968 the Trial Court entered judgment in favor of petitioner and the intervenor State of Nebraska for $89,933.00, which petitioner and the defendant had stipulated was the value of the oil recoverable from petitioner's lands, less a sum to be allowed defendant as its cost of operation in recovering the oil. (R: Pages 27 - 31)

9. On appeal to the Supreme Court of Nebraska by the defendant, the Supreme Court reversed the judgment of the Trial Court holding that petitioner was limited to a recovery ". . . that petitioner should have a right to recover what he can prove by preponderance of the evidence he could have obtained through his own efforts if he had drilled, developed and operated his property outside the unitization project, that is, if no unitization had occurred." That deci-

sion, unsupported by the law and evidence, was a further taking of the property of petitioner without due process of law and without compensation for the oil recovered by the defendant and the amount of which recoverable oil was stipulated to by the defendant.

10. Petitioner then filed a motion for rehearing, but the same was denied by the Supreme Court of Nebraska on September 16, 1969.

Petitioner takes the position that the denial of his right to drill was the unconstitutional taking of his property without due process of law and was without compensation to him—even though defendant recovered the oil and made no compensation therefor. Actually, one might say that the net result is as follows:

(A) Petitioner, you cannot drill to recover the oil admittedly on your land.

(B) Defendant, you may waterflood the petitioner's lands and recover his oil except as to the limited amount that could be recovered by primary methods.

(C) Petitioner, you cannot recover any of the oil under your land which is being swept away by the defendant's operations but you, the defendant, can recover all secondary oil of petitioner's.

(D) Defendant, you may sweep your own secondary oil on to the petitioner's land but petitioner cannot recover any of that oil even if you, the defendant, are sweeping petitioner's secondary oil off his land.

It should be noted that for four years while petitioner was taking action to enforce his rights, that defendant was resisting those rights—and defendant was sweeping off the oil from petitioner's land because he could not drill, all as more fully illustrated by the following:

(A) Defendant appeared in the proceedings in 1961 when petitioner first sought the right to drill. (R: Par. 4, p. 19)

(B) Defendant appeared in the District Court proceedings and resisted the efforts of petitioner to have the Commission's order voided. (R: Par. 5, p. 20)

(C) Defendant opposed the granting of the permit in the subsequent hearings before the Commission.

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Nebraska should be reversed because it erroneously interprets Nebraska law in its aspect of the construction of property rights as guaranteed by the Constitution of the United States and the Constitution of the State of Nebraska.

1. The Nebraska Supreme Court erred in its interpretation of what is a "property right" both under the Nebraska law, the Constitution of the State of Nebraska, and the Constitution of the United States. That petitioner had a property right in the oil under his lands is supported by the case of *Krone v. Lacy,* 168 Neb. 792, 97 N.W.2d 588 (1959) where the Nebraska Supreme Court examined at length as to the nature of the interest in oil and gas in place and where the Supreme Court of Nebraska quoted with approval the language of *Broderick v. Stevenson Consolidated Oil Co.,* 88 Mont. 34, 290 Pac. 244, (1930) as follows:

> " . . . oil remaining in the ground before recovery is a part of the land and belongs to the owner of the land."

Also, in *Belgum v. City of Kimball,* 136 Neb. 744, 81 N.W.2d 205 (1957), where the issue was the determination of the respective rights of the City of Kimball and the

adjoining property owners in oil and gas produced from under the streets and alleys within township drilling blocks, the Supreme Court of Nebraska concluded as follows:

> "Where the fee to streets and alleys, and not merely easements thereon, is vested in the municipality, *it owns the minerals under the surface of the streets and alleys,* and the adjoining lot owners would have no right, title or interest in said minerals until such streets and alleys are vacated by the municipalities as provided by law." (emphasis added)

The Supreme Court of Nebraska, in the decision here complained of, did not overrule its own decisions in the Krone and Belgum cases, *supra*. It may have attempted to qualify the property right to the oil on the principle of injection of oil and that the party recovering the oil has the right to such oil—but such a qualification has no application here when the right to capture the oil under his land was denied the petitioner.

Article XIV of the Constitution of the United States provides in part as follows:

> " . . . nor shall any state deprive any person . . . of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The Constitution of the State of Nebraska provides in part:

> *Section 21 of Article I.* "The property of no person shall be taken or damaged for public use without just compensation therefor."

Section 3 of the Bill of Rights of the Constitution provides in part as follows:

> "No person shall be deprived of . . . property without due process of law."

In *Jenel vs. Green Island Drain Co.*, 12 Neb. 163, 10 NW 547 (1881) the Supreme Court of Nebraska held:

> "The legislators possess no authority, however, to take the property of one citizen and transfer it to another, even when full compensation is made.
>
> "The law guarantees to everyone the free use and enjoyment of his property, *and he can be required to surrender it only when it is required for public use, and upon full compensation being made.*" (emphasis added)

If the legislature could not take away the property of petitioner, how much less can the Supreme Court of Nebraska take away that property.

The Legislature of the State of Nebraska made no attempt to take the property of petitioner. In fact, it safeguarded that right even when enacting the provisions for unitization. As stated above, the legislature, in providing for unit agreement when approved by the Commission, enacted the following provision:

> "Such agreements bind only the persons who execute them, and their heirs, successors, assigns, and legal representatives" (57-910(10)).

There is no provision in the law that requires one to join a unit—but such a requirement is being imposed on petitioner by the Nebraska Supreme Court holding that since a fair offer to join the unit was made to petitioner that he was required to accept that offer or lose his property. Such a holding is directly contrary to the provisions of the Constitution of the State of Nebraska and the case law in

Nebraska. It should be further noted that petitioner was willing to accept the allocation of oil to his lands under the unit agreement; he did, however, object to an additional assessment being made against him, which assessment was also applicable to other parties. That was a negotiable item and the parties could not reach agreement as to the assessment.

But did not petitioner have that right of refusal? He negotiated in good faith—but such negotiations broke down—but that is no legal basis to hold that he therefore loses his property.

The Nebraska Oil and Gas Conservation Act fixes the rights of the parties. Said law stated if one did not join a unit, he was not bound thereby. This principle has been followed in some of the larger producing oil states where problems similar to the present one arose.

The right asserted by petitioner is the right to drill upon his property and develop the oil and gas in place thereunder. This is a right which has been recognized as a property right in decisions of the courts, based upon § 1 of the 14th Amendment of the United States Constitution. In *Richfield Oil Corporation v. Crawford,* 241 P.2d 1020 (1952), the District Court of Appeals of California pointed out that a long string of decisions supported this principle. There, the court quotes with approval language which states that this right (the right to drill) was one entitled to protection as much as was the property itself and that an undue restriction thereon was a taking for constitutional purposes equal to appropriation or destruction, *supra,* at 1025. Also, the United States Supreme Court, in *Ohio Oil Company v. Indiana,* 177 U.S. 190, 209, 205 Ct. 576 (1899) has said

> " They could not be absolutely deprived of this right (i.e. to drill and reduce to possession)

> which belongs to them without a taking of private property."

This deprivation and restriction of this right, by the decision of the Nebraska Supreme Court, is the taking in the constitutional sense complained of by the petitioner in this case.

A leading case, similar in the deprivation of the right complained of by petitioner here, is *Bernstein v. Bush*, 29 Cal. 2d 773, 177 P.2d 913 (1947) when the oil well spacing provisions of the Public Resources Code of California were involved. There the petitioners complained that their rights to drill and reduce to possession oil and gas were deprived by the spacing statutes which required certain minimum acreages upon which a well could be drilled. The Supreme Court of California, citing both the United States and California constitutions, held that the police power of the state could not be so exercised as to deprive petitioners of their right to drill for oil. Petitioners could not be deprived of their right to drill, of their right to reduce to possession the oil and gas under their lands, and that the test of confiscation was the denial to one of the property owners of the equal opportunity to develop and realize the benefits from his leasehold. To quote the words of the court:

> " . . . the mere *opportunity for voluntary pooling of interest does not afford equal protection within the meaning of the Federal and State Constitutions;* regulatory provisions which in effect prohibit the drilling of offset wells may amount to a denial of the equal protection of the law and a taking of private property without due process of law. *Equal protection is so denied where, as here, the law, and its application at least, does not afford adequate means of protection as a*

substitute for the right to drill an offset well." *Supra*, at 918 (Emphasis added)

This is exactly what the Supreme Court of Nebraska has failed to see, that merely affording an opportunity to participate does not provide equal protection of the law in the constitutional sense. The court fails to balance the right of the petitioner in its decision, and finds that the public policy of the state expressed in the conservation statutes overrides this property right of petitioner to drill. The Supreme Court of Nebraska also places considerable reliance on the asserted lack of profitability of any well drilled by petitioner. This objection was dealt with in *Halbouty v. Darcey*, 326 SW2d 528, (1959) in which the court of Civil Appeals of Texas said, in part,

> "The law recognizes the right of an owner to recover the oil and gas under his land as a vested right and one of which he cannot be deprived. . . . This being true the right is not to be denied because it appears to be uneconomical. This vested right to recover such oil and gas is to be considered in connection with the law of capture which is also recognized as a property right. . . . The probability that oil and gas from surrounding tracts would drain to the .48 acre tract could not be lawful reasons for denying the permit because such fact is only part of the law of capture."

The court also mentioned that an offer to pool was not relevant, since it, as here, was a matter of voluntary agreement only; and that later changes in rules, as here, were to in no event influence the outcome of the pre-existing action.

The only situations in which these rights as asserted by petitioner are allowed to be negated are those *in which adequate substitutes are provided by law*. The best example

of this is the California case of *Hunter v. Justices' Court of Centinela Tp., Los Angeles County*, 36 Cal. 2d 315, 223 P.2d 465 (1950). In response to the holding in the Bernstein case, *supra*, the California legislature amended the Public Resources Code of that state so as to provide for the involuntary inclusion of lands which would otherwise be considered too small an area for wells to be drilled upon, since they would be "public nuisances" otherwise, in the leaseholds on other surrounding lands for purposes of development of oil and gas. (Section 3608 of the Public Resources Code.) In addition, the Section provided for the distribution of a pro rata share of the landowners royalty to be paid to the interest in the lands so included, in no case such pro rata share being less than that to which they were entitled.

The question there was whether Section 3608 of the Public Resources Code provided an adequate substitute as required by the court in the Bernstein case, and the court held that it was an adequate substitution. In so doing, the court stressed that the Section in question guaranteed to such owner his share of a minimum royalty, and that the object of such provision was to prevent the situations in which some take all and leave others with nothing. The crucial point is that the court found that the Section was not an arbitrary and unreasonable method for achieving conservation of oil and equal protection of the several owners' rights to extract it. This protection is just what is lacking in the decision of the Nebraska Supreme Court. The court fails to apply a Nebraska law requiring protection of the correlative rights of all owners in the field. Here, petitioner had a right to drill and recover the oil underlying his land. The court is saying that this right of his is outweighed by the purposes of the oil and gas conservation law of the state but at the same time the Court fails to protect his rights which are expressly provided for in the statute; this it may not do.

In its application to petitioner Baumgartner, such public policy is in derogation of the constitutional right not to have property taken without due process of law or just compensation, and denies to petitioner equal protection of the law in that it denies petitioner protection of his correlative rights in the oil and gas. The decision of the Nebraska Supreme Court lacks just those elements needed to make such a deprivation a constitutional exercise of the police power. It does not afford the "adequate substitute" necessary to protect those who validly wish to exercise their rights to drill and produce oil and gas without joining a unit. As the Montana Supreme Court, in *Pattie v. Montana Oil & Gas Conservation Commission,* 145, Mont. 531, 402 P.2d 596, (1965) said

> " . . . Unless the Montana Act is flexible enough to permit the Commission to make orders with an eye to the interests of adjacent landowners in sharing in the common supply, a legislation would have to be held unconstitutional as a deprivation of property without due process of law, as happened in California." (citing Bernstein v. Bush, *supra*).

The decision of the Nebraska Supreme Court also fails to provide for the correlative rights of other landowners in its view of the exercises of the police power of the state and so must be held to be unconstitutional. It fails to offer protection, it fails to balance the rights of other landowners in the field, all as provided for in the Oil and Gas Conservation Act of the State of Nebraska. This balancing of the interest is crucial; to quote the Montana court in *Pattie, supra,*

> "Conservation legislation is an action of the police power, and in order to sustain it as a reasonable regulatory measure, it is necessary that

> the public's interest in preserving the natural resource be balanced with the landowners interest in developing and selling it . . . the interest of both the public and the landowners *must be considered. . .*" (Emphasis added)

Petitioner does not claim that the Nebraska regulations do not protect him, but that as interpreted by the Nebraska Supreme Court, his property rights as established by numerous court decisions are not protected, and as such, it is as to him a denial of equal protection of the law, a denial of due process of law, and an unconstitutional taking without compensation, all in violation of the Constitution of the United States and the Constitution of the State of Nebraska.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Nebraska.

Respectfully submitted,

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